

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 197 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT

Versus

BHURSINH A RATHOD

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Appearance:

PUBLIC PROSECUTOR for Appellant (Absent)

MR JM PANCHAL for Respondent No. 1, 2, 3, 4

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CORAM : MR.JUSTICE B.C.PATEL

Date of decision: 17/08/98

ORAL JUDGEMENT

State has preferred this appeal against the order of acquittal recorded by Judicial Magistrate First Class (Ahmedabad Rural) on 11.1.1989 in Criminal Case No. 265 of 1984 whereby the accused, who were tried for an offence punishable under section 3 of the Railways Property (Unlawful Possession) Act, were acquitted.

2. Short facts, as it emerges from the records, are as under:

PW.1 Jivanji Bhagwanji Ex.28 received a message on 3.7.1983 at Kankaria to the effect that from Vatva Yard, before some time an offence of theft has been committed from Wagon No. 59684. On receiving information, the said Jivanji, in the company of Inspector Dubey and Arjunlal, went to the spot and were conveyed the information that one person is detained with stolen article at Vatva, and on inquiry from the said person, he disclosed his identity as Bechar Ganesh, and on further question, he produced one Pant and one shirt made of Polyester cloth. He was not able to explain satisfactorily about the possession of the said clothes. On further questioning, the said Bechar Ganesh stated that accused No.1 Bhursinh Arjunsinh, serving at Vatva as SRPF Jawan delivered the goods on payment of Rs.100/-. It was also revealed during further investigation that other personnel of RPF, namely: Mansukh Shankarabhai, Shukalbhai, Kantibhai, and Laxmansinh, Railway employee Laxman Chhagan, and Tailors Chandrasekhar, Gajendra and Yogendra and others also purchased cloth, and they also produced the dresses prepared from that cloth. They stated that they purchased the cloth from Bhursinh. Bhursinh was called for interrogation and he disclosed that on 29.4.1983 at about 10.00 pm when he was discharging duties in the company of Mulsinh and another jawan of RPF, they broke open the seal of a wagon bearing No. 59684 and took out Khakhi Polyester cloth, in all nine bundles (takas), and thereafter again applied the seals to the wagon. It was also informed that out of the said cloth, Nathabhai, Head Constable, was also given some cloth. Ultimately, he took out about 8 Mtrs. of cloth from his house. Virendrasinh was also investigating another case and during that investigation, he recovered 24.80 mtrs. of Khakhi Polyester Cloth from Nathabhai, accused No.2. On 5.7.1983, accused No.1 Bhursinh was further questioned and in the presence of panchas, from a place near his house, took out one jute bag from which he produced about 28 Mtrs. of Cloth. Bhursinh gave the cloth to a tailor for stitching, and on 6.7.1983, the clothes were also seized under a panchnama from the tailor's shop. On further questioning, Bhursinh disclosed on 7.7.83 that he has concealed similar cloth and another 20 mtrs. of cloth was recovered. Thus, in all, 48 mtrs. of cloth was recovered. Search warrant was obtained from JMFC for search of house of Bhimsinh, accused No.4 and Mulsinh, accused No.3. In all, about 13 mtrs of cloth was recovered. Mulsinh, accused No.3, was absconding at the relevant time when the investigation was under progress. From his house, 95 mtrs. of khakhi polyester cloth was recovered. Nobody produced any bill

or tendered any satisfactory evidence so as to disclose that they were in lawful possession of the material in question. In all 209.10 mtrs. of cloth manufactured by Bombay Dyeing, valued at about Rs.18,140/- (including garments) came to be recovered.

3. As per prosecution case, wagon No. 59684 was carrying this cloth and when the consignment was delivered at Ambli Road Station. it was noticed that out of 32 bundles, 3 bundles were in broken condition. A telegraphic message was, therefore, sent on 11.5.1983. The goods were delivered on 2.6.1983 and it was noticed that there was shortage of 436 mtrs. of cloth. After making investigation, complaint was filed before the Court. The trial Court held that the prosecution has not proved its case beyond reasonable doubt, by judgment and order dated 11.1.1989. State has preferred this appeal against the said order of acquittal.

4. In the instant case, evidence discloses that the accused produced Terricotton cloth manufactured by Bombay Dyeing. There was no satisfactory explanation. Mr. Panchal, learned Advocate appearing for the accused submitted that the trial Court has appreciated the evidence and has acquitted the accused, and, therefore, this Court should not interfere with the order of acquittal. He drew the attention of the Court to the fact that the evidence is not at all acceptable in view of variance in the complaint, recovery of cloth and the evidence of Goods Clerk PW.12 Suresh, Asst. Station Master Ambli Road PW.13 Maichle Peter, Bombay Dyeing Mills Sales Executive PW.14 Adi Rustomji. Mr. Panchal drew my attention to the documents produced in this case and pointed out the following discrepancies:-

(i). As per prosecution evidence of Adi Rustomji PW. 14, the goods, viz: Khakhi cloth was dispatched on 15.4.1983 in 32 bundles which was meant for Central Reserve Police, Gandhinagar.

(ii). PW. 12 Suresh pointed out that when he was working as a Goods Clerk at Platform No.3 on 17.8.1983, 32 bundles were booked for Ambli Road Station under Railway Receipt No. 186978 Exh. 102.

(iii). Maichle Peter PW.13 who was discharging his duties as Assistant Station Master at Ambli Road Station on 2.6.1983 has stated that under RR No. 186978, 1157.0 Mtrs. of Terri Cotton Cloth was delivered, and there was shortage of 436 Mtrs.

5. RR Number 186978 which is produced on record indicates that the Railways accepted consignment of 32 bales in all (18 + 14 Bales) for Ambli Road; The consignee is Commandant, Group CRPF, Gandhinagar. The goods forwarded under this Receipt is not Polyester Khakhi Cloth but it is "Indian Art Silk Polyester", and, therefore, it cannot be said that the cloth stolen in the month of April was the same because the goods booked was of different variety.

6. Mr. Panchal further submitted that the aforesaid three witnesses are referring to Polyester-Cotton, and, therefore, it is difficult to connect the consignment under RR Number 186978 with the goods recovered from the accused. He further submitted that in the Court even PW. 14 Adi Rustomji could not establish the identity of the cloth. He further submitted that the message said to have been forwarded has not been produced on record. He further submitted that Panchas have not supported the prosecution, and, therefore, the order of acquittal should not be disturbed.

7. No doubt some cloth has been recovered from the possession of the accused, and some persons have purchased the cloth from the accused persons, but the evidence produced on record by the prosecution reveals that under the RR in question Indian Art Silk Polyester was consigned and not the cloth recovered from the accused. Therefore, it is difficult to accept the version put forth by the prosecution before the Court.

8. No one has appeared for the State before this Court though the matter is notified.

9. The trial Court has also pointed out that nobody has explained the procedure of sealing the wagons; the battery alleged to have been used is committing the crime has not been produced; which cloth is taken from which bundle/bale is not clarified [This is important because some witnesses have referred bales and some have referred as 'wooden boxes']. Mr. Panchal submitted that the movement register of the wagon is also not produced. Arjunlal PW.11 has deposed that the goods were loaded on 20.8.83. The wagon was lying at Vatva Yard for 6/7 days and therefore suspicion arose that theft must have been committed when the wagon was at Vatva yard. If the prosecution has come out with the version that accused committed theft in April 1983, then the same is required to be rejected in view of the evidence that goods booked were of a different variety. There must be specific evidence that on a particular date the wagon was booked

and it has moved from place to place so that it can be positively stated that a particular wagon was at a particular place from where the theft has been committed.

10. This is an appeal against the order of acquittal.

The Court has carefully gone through the evidence. In an appeal against the order of acquittal, though there is no limitation upon the power of the High Court to review at large the evidence upon which the acquittal was founded and to reach to a conclusion that the order of acquittal should be reversed, in exercising that power and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1). the view of the trial judge as to the credibility of the witnesses; (2). the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3). the right of the accused to the benefit of any doubt, and, (4). the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses (See AIR 1934 PC 227).

11. In view of what is stated hereinabove, this Court would not like to interfere with the order of acquittal. In the result, this appeal stands dismissed.

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